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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SUSAN LANGE, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., et al. Defendants and Respondents.	2d Civil No. B233670 (Super. Ct. No. 56-2010-00378356) (Ventura County)

This case arises from the foreclosure and sale of Susan Lange's (Lange) home. The trial court sustained a demurrer without leave to amend to Lange's third amended complaint against her lender and the buyers at the foreclosure sale. We affirm.

FACTS AND PROCEDURAL HISTORY

A. *Facts*

We accept as true the facts alleged in the complaint except where they conflict with exhibits attached to the pleadings or matters judicially noticed. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Tucker v. Pacific Bell Mobile Servs.* (2012) 208 Cal.App.4th 201, 210.)

In 2005, Lange borrowed $1.387 million from Washington Mutual (WaMu). The loan had a low interest rate of 1.35 percent for one year, but the rate could thereafter float up to 10.3 percent. The loan was secured by a deed of trust on Lange's home on Running Ridge Trail in Ojai, California. JP Morgan Chase Bank, N.A. (Chase) acquired Lange's loan and deed of trust from the FDIC in 2008.

By 2009, Lange was behind in her monthly payments. Chase initiated foreclosure proceedings. On March 18, 2009, Chase signed a document substituting a new trustee under the deed of trust and that new trustee executed a Notice of Default on Lange's loan. It was not until a week later, and after the trustee recorded the Notice of Default, that Chase notarized the document substituting the new trustee.

Chase did not immediately proceed to a foreclosure sale. Instead, Chase and Lange negotiated an interim trial plan agreement (TPA). The agreement required Chase to hold off on foreclosure and to "re-evaluate" Lange's loan for a "permanent workout solution," while Lange made three monthly payments of $6,384 in September, October and November 2009. Lange made all three payments, although no "workout solution" was reached. Lange continued making monthly payments to Chase after November 2009.

After two failed attempts to contact Lange, the new trustee held a foreclosure sale in July 2010. Alta Community Investment III, LLC (Alta) and Seaside Capital Fund I, LP (Seaside) bought Lange's home for $750,000. Lange owed $1.64 million on the loan by that time.

B. *Procedural History*

Lange sued Chase, Alta and Seaside (collectively Defendants) to set aside the foreclosure sale and for damages on several different theories. In the midst of litigating a demurrer to her second amended complaint, the trial court granted Lange leave to file a third amended complaint as long as she added no new parties. The court eventually sustained Defendants' demurrers to her third amended complaint without leave to amend.

DISCUSSION

Lange argues that the trial court erred in sustaining the demurrer, in denying her leave to amend and in denying her request to add new parties to the third amended complaint. We independently review whether a complaint alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) We review the remaining issues for an abuse of discretion. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*); *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1141 (*Price*).)

I. *The Trial Court Properly Sustained the Demurrer*

A. *Procedural Defects*

1. *Lack of tender*

Before a homeowner may sue to set aside a foreclosure, she must offer to tender the full amount due on the underlying promissory note. (*Shuster v. BAC Home Loans Servicing* (2012) 211 Cal.App.4th 500, __, __ [2012 Cal.App. LEXIS 1219 at pp. 12-13]; *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707.) Lange has not tendered the $1.64 million due on her note. Consequently, those portions of her first cause of action addressing irregularities in the foreclosure procedure and her seventh cause of action for quiet title are barred for lack of tender.

Lange proffers two reasons why she may proceed with these claims notwithstanding a lack of tender. First, she argues that the tender requirement is optional. That is not the law in California. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155 & fn. 6.)

Second, she argues that her claims fall into two of the exceptions to the tender requirement. She asserts that the foreclosure sale was void. Irregularities in foreclosure procedures render a sale "void" only if the deed of sale lacks language invoking the conclusive statutory presumptions that all notices were properly given. (Civ. Code, § 2924, subd. (c); see *Little v. CFS Serv. Corp.* (1987)

188 Cal.App.3d 1354, 1359.)[1] The deed in this case made the proper recitals, so the sale is merely "voidable" and tender is still required. Lange also argues that tender is not required when the homeowner is entitled to an offset against the lender. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 113.) Lange claims that the $12 million in damages she seeks constitute an offset. We disagree. If a prayer for damages could overcome the tender requirement, the tender requirement would be easy to circumvent. Because Lange's claims are all legally barred, her damages prayer will not come to fruition in any event.

2. *Immunity for WaMu's acts*

When Chase acquired WaMu's loans from the FDIC in 2008, Chase expressly declined to assume liability for WaMu's acts prior to the acquisition. (See *Zivanic v. Washington Mutual Bank, F.A.* (N.D. Cal. 2010) 2010 U.S. Dist. LEXIS 56846 at pp. 6-10 [recounting § 2.5 of Purchase and Assumption Agreement between FDIC and Chase].) Many of Lange's claims seek to hold Chase responsible for WaMu's conduct in creating her loan in 2006. Because these claims are barred by assumption agreement, the trial court properly sustained the demurrers to Lange's fourth cause of action for Truth-in-Lending Act violations and, to the extent they rely on misconduct by WaMu, Lange's sixth cause of action for fraud and her tenth cause of action for intentional infliction of emotional distress.

3. *Mootness*

A party may only litigate an "actual, present controversy" for which a court may award effective relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 783.) In her eighth cause of action, Lange seeks declaratory relief regarding the meaning of the 2006 deed of trust and an injunction to stop Alta and Seaside from reselling her home. Because the foreclosure sale extinguished the 2006 deed (§ 2910) and

[1] All statutory references are to the Civil Code.

because Alta and Seaside subsequently sold her home, Lange's eighth cause of action for declaratory and injunctive relief is moot.[2]

4. *Judicial estoppel*

The doctrine of judicial estoppel prevents a party from taking one position before the trial court and another on appeal. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 118.) Lange did not oppose the demurrer to her sixth cause of action for violation of the Real Estate Settlement Procedures Act (RESPA), her ninth cause of action for slander of title, and her tenth cause of action for intentional infliction of emotional distress. Because the trial court relied on Lange's acquiescence in its ruling on the demurrers, Lange is judicially estopped from re-asserting those claims now.

These claims are legally barred in any event. A defendant may not assert a RESPA claim for failure to provide information after a lawsuit is filed. (12 U.S.C. § 2605(e)(1); *Jones v. ABM AMRO Mortg. Group, Inc.* (E.D. Pa. 2008) 551 F.Supp.2d 400, 411.) Yet, that is precisely what Lange alleges. Lange's slander of title claim is barred by the "common interest privilege" because Chase did not make statements with "hatred or ill will." (§§ 47, subd. (c); 2924, subd. (d); *Kachon v. Markowitz* (2008) 168 Cal.App.4th 316, 341; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723.) Lange's emotional distress claim requires allegations of "extreme and outrageous conduct." (*Ragland v. U.S. Bank Nat'l Assn.*(2012) 209 Cal.App.4th 182, 204 (*Ragland*).) Lange alleges that Chase initiated foreclosure proceedings on her house while knowing WaMu had securitized her loan. Because, as discussed below, securitization does not preclude foreclosure, Chase did not engage in extreme or outrageous conduct. Lange alleges

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[2] We grant Alta's and Seaside's request to judicially notice the grant deed reflecting this second sale. (See *Herrera v. Deutsch Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.) We deny the request to judicially notice the trial court's order expunging notice of the pending actions because that document is already part of the augmented record.

that Alta and Seaside sent someone to her door asking her to vacate after the foreclosure sale, but this is not "extreme and outrageous."

B. *Substance of Claims*

1. *Securitization*

In several of her claims, Lange alleges that WaMu sold her promissory note to a pool of investors and that this "securitization" of her loan precluded WaMu and its successor Chase from initiating foreclosure proceedings. Because section 2924, subdivision (a)(1) confers the power to initiate foreclosure proceedings on the designated trustee, beneficiary or their authorized agent, we have repeatedly rejected the argument that securitization of a promissory note forever precludes foreclosure on the deed of trust. (E.g., *DeBrunner v. Duetsch Bank Nat'l Trust Co.* (2012) 204 Cal.App.4th 433, 441.) Lange cites *Mena v. JP Morgan Chase Bank, N.A.* (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS 128585. However, *Mena* deals with a lender who had tried to foreclose on a property after selling the *deed of trust* to someone else. Accordingly, the trial court properly sustained the demurrer to the securitization portion of Lange's third cause of action and to her fifth cause of action for rescission.

2. *Violation of section 2923.5*

In her second cause of action, Lange alleges that Chase violated section 2923.5 by not contacting her and exploring options other than foreclosure. The sole remedy for a violation of this section is postponement of a foreclosure sale. (*Mabry v. Super. Ct.* (2010) 185 Cal.App.4th 208, 235.) Because this is a post-foreclosure case, the demurrer to this claim was properly sustained.

3. *Unjust enrichment*

In her third cause of action, Lange alleges two sets of unjust enrichment claims. She alleges that Chase was unjustly enriched when she paid $56,700 under the TPA, when Chase received the $750,000 in proceeds from the foreclosure sale, and when it received payments for any credit default insurance it might have had. These amounts are less than the $1.6 million Lange owed Chase.

Consequently, Chase did not unjustly receive or retain a benefit at the expense of another. (*Elder v. Pacific Bell Tel. Co.* (2012) 205 Cal.App.4th 841, 857.)

Lange also alleges that Alta and Seaside were unjustly enriched when she paid them $6,000 per month to postpone eviction pursuant to a court order in a separate unlawful detainer action, and when Alta and Seaside obtained title to her home notwithstanding defects in title. Lange's monthly payments were not unjust; they were in exchange for a postponement of eviction.

Nor was Alta and Seaside's acquisition of title unjust. Lange points to two alleged defects in their title. She argues that the substitution of trustee was not notarized or recorded until *after* the Notice of Default was executed. But this sequence does not render the foreclosure sale defective. A substitution of trustee is valid as long as it is executed on or before the notice of default. (§ 2934a, subd. (b).) Here, the substitution and notice of default were executed on the same day. Lange also asserts that Chase never recorded its earlier assumption of her note, but recording is not required. (*Calvo v. HSBC Bank, USA, N.A.* (2011) 199 Cal.App.4th 118, 121-122; cf. § 2934 [assignments "may" be recorded], § 2932.5 [assignments of mortgages, unlike deeds of trust, must be recorded].)

4. *Contract-based claims*

Lange also alleges several contract-related claims. In her fifth cause of action, she argues that her original promissory note is subject to rescission and that Chase breached the TPA when it held a foreclosure sale while she was still making monthly payments.

She asserts rescission is appropriate because WaMu never disclosed its unspoken belief that she would be unable to make her payments on the note. Because Lange believed she could make the payments, Lange contends that this mismatch in expectations precluded a meeting of the minds. Contracts are formed based on the objective manifestations of the parties, and not their unspoken expectations. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 202.) Here, the loan documents signed by the parties reflect an agreement.

We also conclude, as a matter of law, that the TPA was not breached. The TPA's plain terms contemplated forbearance by Chase only during the three months referred to in the TPA. Lange's unilateral act in making payments beyond that period also did not estop Chase from holding a foreclosure sale. Promissory estoppel arises only if the defendant makes a "clear and unambiguous" promise and the plaintiff changes her position to her detriment due to that promise. (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225; *Grill v. BAC Home Loans Servicing, L.P.* (E.D. Cal. 2011) 2011 U.S. Dist. LEXIS 3771 at pp. 21-22.) Here, the TPA's plain language *refutes* the notion that Chase promised an open-ended forbearance. Lange's post-TPA payments simply paid down her outstanding debt.

In her eleventh cause of action, Lange claims that Chase also violated the covenant of good faith and fair dealing. Because that cause of action does not add any substantive duties beyond those in the contracts at issue (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350), the demurrers to this claim were properly sustained along with the demurrers to her other contract-based claims.

5. *Fraud and concealment*

In her sixth cause of action, Lange alleges that Chase did not disclose its intent to breach the TPA and did not respond to her informal discovery request. The "'. . . failure to disclose is ordinarily not actionable fraud unless there is a fiduciary relationship giving rise to a duty to disclose.' [Citations.]" (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483.) Because no such duty runs between a lender and borrower (*Ragland, supra*, 209 Cal.App.4th at p. 206), the demurrer to this claim was properly sustained.

6. *Constructive trust and respondeat superior*

In her twelfth and thirteenth causes of action, Lange alleges claims for constructive trust and respondeat superior. Neither is an independent cause of action. (*Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65, 82 [constructive trust]; *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 [respondaet superior].)

7. *Negligence*

In her fourteenth cause of action, Lange alleges negligence against all Defendants. Negligence requires a duty running between the plaintiff and each defendant. (*Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662.) As a lender that negotiated with Lange at arm's length, Chase owes Lange no duty of care. (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34-35; *Perlas v. GMAC Mortgage LLC* (2010) 187 Cal.App.4th 429, 436 [no duty to ensure borrower can repay loan]; *Bank of America Corp. v. Super. Ct.* (2011) 198 Cal.App.4th 862, 872 [no duty to disclose unspoken tortious intent].) As entities with no contractual or other direct relationship to Lange, Alta and Seaside owe even less of a duty to her. Lange's negligence claims accordingly fail as a matter of law.

C. *The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend*

Because each of Lange's claims fails as a matter of law and because there is no reasonable possibility that the above-described legal deficiencies can be cured by amending the complaint, the trial court's denial of leave to amend was not an abuse of discretion. (*Goodman, supra,* 18 Cal.3d at p. 349.) In her reply brief, Lange contends that she could amend her complaint to add claims for defective notice of the foreclosure sales under sections 2924f and 2924g, subdivision (d). For the reasons explained above, these claims are also barred for lack of tender.

D. *The Trial Court Did Not Abuse Its Discretion in Denying Lange Leave to Add New Parties in Her Third Amended Complaint*

In denying Lange permission to add new parties, the trial court weighed Lange's lack of diligence in identifying new parties in the prior seven months against the undue prejudice to Chase, Alta and Seaside that would arise from adding new parties and effectively restarting the motions litigation in the case. This was not an abuse of discretion. (*Price, supra,* 192 Cal.App.4th at p. 1141.)

CONCLUSION

The judgment is affirmed. Costs are awarded to Chase, Alta and Seaside.

NOT TO BE PUBLISHED.

HOFFSTADT, J.*

We concur:

GILBERT, P. J.

PERREN, J.

* Assigned by the Chairperson of the Judicial Council.

Mark S. Borrell, Judge

Superior Court County of Ventura

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